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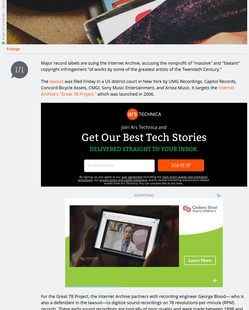
TECH ROUNDTABLE

Internet Archive's legal woes mount as record labels sue for $400M

The Internet Archive also reached a confidential settlement with book publishers.

JOHN TIMMER - 8/10/2023, 11:57 AM



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Major record labels are suing the Internet Archive, accusing the nonprofit of "massive" and "blatant" copyright infringement "of works by some of the greatest artists of the Twentieth Century."

The lawsuit was filed Friday in a US district court in New York by UMG Recordings, Capitol Records, Concord Bicycle Assets, CMGI, Sony Music Entertainment, and Arista Music. It targets the Internet Archive's "Great 78 Project," which was launched in 2006.

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For the Great 78 Project, the Internet Archive partners with recording engineer George Blood — who is also a defendant in the lawsuit—to digitize sound recordings on 78 revolutions per minute (RPM) records. These early sound recordings are typically of poor quality and were made between 1898 and the late 1950s by using very brittle materials. The goal of the Great 78 Project was to preserve these early recordings so they would not be lost as records break and could continue to be studied as originally recorded.

In a blog post responding to the record labels' lawsuit, Internet Archive founder Brewster Kahle said that the Internet Archive is currently reviewing the challenge and taking it seriously. However, Kahle characterizes the Great 78 Project as providing "free public access to a largely forgotten but culturally important medium," claiming that "there shouldn't be conflict here."

"Through the efforts of dedicated librarians, archivists, and sound engineers, we have preserved hundreds of thousands of recordings that are stored on shellac resin, an obsolete and brittle medium," Kahle said. "The resulting preserved recordings retain the scratch and pop sounds that are present in the analog artifacts; notice how modern remastering techniques remove..."

Blood declined Ars' request to comment on pending litigation.

Record labels said that the conflict is obvious. From their perspective, the Great 78 Project undercuts the industry's profits from selling licenses to stream some of the world's most popular recordings of all time on services like Spotify or Apple Music.

According to Kahle, listeners accessing those streaming songs are different audiences than those who visit the Great 78 Project to hear how original recordings sounded, though.

"When people want to listen to music, they go to Spotify," Kahle said. "When people want to study sound recordings as they were originally created, they go to libraries like the Internet Archive. Both are needed."

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Supporting this logic, Kahle noted that the Great 78 Project's recordings "are used in teaching and research, including by university professors like Jason Luther of Rowan University, whose students use the Great 78 collection as the basis for researching and writing podcasts for use in class assignments."

However, this "usage is tiny," Kahle said, confirming that on average, each recording is accessed by only one researcher per month.

Perhaps if the usage was limited to this research, record labels might continue looking the other way. But the Great 78 Project is also sure "hundreds of thousands" of popular recordings that have been accessed and downloaded hundreds or even thousands of times on the Great 78 Project's website. This causes "significant harm" to labels, as well as artists and their heirs, whom the complaint said never "see a dime" from the Internet Archive's distribution of their songs.

The complaint said that rather than paying artists and rights holders, the Internet Archive financially benefits from digitizing popular recordings. Record labels alleged that the Internet Archive advertises the free music hosted by the Great 78 Project on social media, attracting a wider audience to webpages where the Internet Archive requests donations. They argue that the Internet Archive is "willfully" ignoring copyrights to attract more donations by giving away popular songs that the nonprofit has no right to distribute.

Lawyers for record labels did not respond to Ars' request to comment but wrote in the complaint that the Internet Archive attempts "to defend their wholesale theft of generations of music under the guise of 'preservation and research,' but this is a smokescreen: their activities far exceed those limited purposes."

"Internet Archive unabashedly seeks to provide free and unlimited access to music for everyone, regardless of copyright," the complaint said.

Record labels have demanded a jury trial and damages that could amount to hundreds of millions of dollars. The complaint identifies more than 2,700 infringing works, estimating that appropriate damages for each recording could amount to $150,000. A loss could cost Internet Archive more than $400 million.

Kahle seems prepared to defend against the charges that the Great 78 Project violates the Copyright Act and the Music Modernization Act, which was enacted in 2018 to prevent copyright protections explicitly for pre-1972 recordings. Because record labels' lawsuit quickly followed on the heels of a challenge from book publishers who successfully sued the Internet Archive over copyright claims earlier this year, Kahle has questioned the motives of lawyers behind this latest complaint.

"Now the Washington lawyers want to destroy a digital collection of scratchy 78 RPM records, 70 to 120 years old, built by dedicated preservationists in 2006," Kahle said The New York Times. "Who benefits?"

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Great 78 Project isn't fair use, labels say

Record labels alleged that the Internet Archive cannot claim that the Great 78 Project is an example of fair use under the Copyright Act because the "wholesale" use of the sound recordings at issue is identical to plaintiffs' use, defendants use the works in their entirety, the works are unquestionably the most creative type of works worthy of protection, and defendants' infringement undermines an existing commercial market for selling downloads and licensing streams of the recordings."

In March, a judge ruled that the Internet Archive had violated copyright law by digitizing and distributing unauthorized e-books instead of paying publishers for e-books licensing, and the record labels seem to be seeking a similar finding in this new lawsuit.

The book publishers' case is cited in the record labels' complaint. Labels noted that "this is not the first time Internet Archive has improperly sought to wrap its infringing conduct in the ill-fitting mantle of fair use. A court in this district recently rejected Internet Archive's attempt to claim fair-use protection for its systematic copying and distribution of copyrighted books."

Ken Doroshow, the chief legal officer for the Recording Industry Association of America—a trade group representing the plaintiffs, which previously had requested takedowns of recordings that the Internet Archive allegedly ignored—issued a statement. He said that record labels are bringing this case to address the Internet Archive's "industrial scale infringement of some of the most iconic recordings ever made—including classic works by Frank Sinatra, Thelonious Monk, Ella Fitzgerald, Billie Holiday, Miles Davis, Louis Armstrong, and many more."

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According to Doroshow, the Great 78 Project is "yet another mass infringement scheme that has no basis in law."

Record labels have asked the court to permanently stop the Internet Archive and Blood from continuing the Great 78 Project. This would prevent the project from reaching its goal: making "available for the nearly 78 rpm recordings ever created."

Mounting costs of Internet Archive lawsuits

Days after record labels filed their complaint, a court document was unsealed showing that the Internet Archive had reached a joint agreement with book publishers' lawsuit over the publishers' legal victory earlier this year. If the judge signs off, the agreement would permanently bar the Internet Archive from lending any unauthorized scans of books when authorized e-book versions exist, Publishers Weekly reported.

The Internet Archive would also be barred from profiting from any infringing works.

It's unclear how high the damages are in this case, but the agreement includes an all-inclusive "confidential monetary settlement" that "substantially" covers publishers' legal fees and costs, as well as damages and other claims. Previously it was estimated that the case could cost Internet Archive more than $3 million, which The Register reported amounts to approximately half of the nonprofit's 2019 budget.

In the book publishers' case, just as in the record labels' case, damages for each infringing work were estimated at around $150,000. The book publishers' case cited 127 infringing works. The record labels' cited more than 2,700. It's easy to see how these lawsuit costs could quickly add up if the Internet Archive is unsuccessful in its next defense.

For now, the Internet Archive can put off fears over how the organization will be impacted by these legal costs. The Internet Archive plans to appeal the book publishers' case. While seeking the appeal, it will be prevented from lending unauthorized e-books. But until the appeal is settled, the Internet Archive does not have to pay the confidential monetary settlement, Publishers Weekly reported.

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ASHLEY BELANGER
Ashley is a senior policy reporter for Ars Technica, dedicated to tracking social impacts of emerging policies and new technologies. She is a Chicago-based journalist with 20 years of experience.

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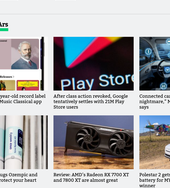

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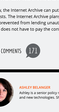

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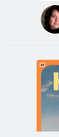

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